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Appointment of the judges of the United Nations Dispute Tribunal

Administration of justice at the United Nations

Administration of justice at the United Nations

Report of the Internal Justice Council

Summary

The Internal Justice Council was established by the General Assembly to provide its views on the implementation of the United Nations internal justice system.

The first report of the new Council takes into account the relevant resolutions of the General Assembly and the recommendations of the Interim Independent Assessment Panel, in particular those endorsed by the Assembly, and draws from extensive consultations with stakeholders in the internal justice system.

In that context, the Council puts forward the following recommendations:

(a) With regard to the lack of staff knowledge and understanding of the internal justice system, the Council recommends the establishment of an ongoing and systematic outreach programme that engages both staff and managers at all levels;

(b) With regard to consolidating the rules and regulations of the United Nations that deal with human resources, the Council recommends that more consistency be ensured in the instruments so as to facilitate uniform interpretation and implementation throughout the system;

(c) With regard to staff access to information and documentation, the Council recommends that the Management Evaluation Unit continue issuing its "lessons learned" guides and disseminate them widely among managers and staff;

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(d) With regard to protection against retaliation, the Council recommends the establishment of an explicit system-wide policy protecting both parties and witnesses before the Tribunals from retaliation;

(e) With regard to the high incidence of staff who represent themselves before the Tribunals, the Council recommends that the issue be further explored throughout all duty stations;

(f) With regard to the system of referrals for accountability, the Council recommends that the referral system be improved with a view to ensuring prompt follow-up action by management on such referrals to prevent the weakening of the statutory referral clauses and the organizational culture of accountability;

(g) With regard to the independence and autonomy of the Tribunals, the Council recommends that a review of all relevant policies and procedures be carried out to ensure adherence to the principle of judicial independence and autonomy;

(h) With regard to the issues of efficiency and efficacy of the internal justice system, the Council makes a number of recommendations in paragraphs 61, 63, 69 and 73.

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I. Introduction

A. Fundamental considerations

1. The General Assembly established the Internal Justice Council in its resolution 62/228 to ensure independence, professionalism and accountability in the system of administration of justice.

2. The Council has been tasked with providing its views to the General Assembly on the implementation of the internal system of justice of the United Nations and on whether it is an "independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike", according to the Assembly's decision in resolution 61/261.

3. The current panel of the Council notes the views of its predecessor in its final report, in which the panel observed that "it is a characteristic of a mature legal system that all three elements of high authority — the Legislature, the Executive and the Judiciary — respect the separation of powers. This requirement is challenging especially in a hierarchical organization such at the United Nations, but it is nevertheless essential if the rule of law is to be respected" (see A/71/158, para. 6).

4. The Council has been guided by prior resolutions of the General Assembly, the findings of the Interim Independent Assessment Panel and its interviews with the various stakeholders in the internal justice system. Its focus included consideration of the following principles: the independence and autonomy of the Tribunals, access to information by staff and their representatives and other concerns of due process, protection against retaliation for parties and witnesses and accountability for wrongdoing. An overall consideration is effectiveness: Does the system provide an adequate framework and sufficient resources to meet its challenges? And what changes are required to ensure that the various components of the system effectively perform their roles?

5. The views of the United Nations Appeals Tribunal and the views of the United Nations Dispute Tribunal are annexed to the present report, in line with paragraph 45 of General Assembly resolution 71/266.

1. Legal status of the Internal Justice Council and the need for comprehensive terms of reference

6. As a body reporting to the General Assembly formed by external jurists and staff members, the Council recommends the promulgation of comprehensive terms of reference that detail the legal and administrative framework governing the Council's work, including a more detailed description of the role and functions of the Chair and the individual members of the Council. Such an instrument should also clarify that, while certain members of the Council are nominated by staff or management, they are not to function as advocates or representatives of the appointing group.

2. Current membership of the Internal Justice Council

7. The current members of the Council, whose terms of office expire on 12 November 2020, are Yvonne Mokgoro (South Africa), jurist serving as Chair; Carmen Artigas (Uruguay), external jurist nominated by staff; Samuel Estreicher (United States of America), external expert nominated by management; Frank Eppert (United States of America), representative nominated by management; and Jamshid Gaziyev (Uzbekistan), representative nominated by staff.

3. Organization of work

8. The four members of the Council commenced their work on 13 November 2016, focusing on the identification of a distinguished jurist to be considered for the position of Chair. After a thorough and lengthy search, the process resulted in the unanimous recommendation of Ms. Mokgoro, who was appointed as Chair on 15 March 2017.

9. After the Chair took office the Council concentrated on the development of a workplan discussing various approaches to the report and the prioritization of its contents. The Council held its first face-to-face session and meetings with stakeholders in New York and Nairobi between 25 and 30 May 2017. Subsequently, members worked on producing inputs for the report, consulting by email or telephone as appropriate and corresponding with the Office of Administration of Justice as necessary.

10. The Council agreed to address certain topics in the report, taking into account the recommendations of the Interim Independent Assessment Panel and the principles upon which the system of justice was established: independence, transparency, professionalism, decentralization and accountability. The Council held meetings in New York and Nairobi and videoconferences with Geneva and Addis Ababa and with various entities within the system of the administration of justice, the judges of the two Tribunals and the representatives of staff and management. All were invited to raise any concerns and matters of interest, including their views on the following topics:

(a) Knowledge of the internal justice system on the part of staff members;

(b) The need for the Organization to further consolidate rules, regulations and instructions and make them easily accessible to and understandable by staff;

(c) Equal access to documentation and information by both parties before the Management Evaluation Unit;

(d) Protection from retaliation;

(e) Investigations in disciplinary proceedings;

(f) Referrals for accountability by the Tribunals;

(g) Independence of the Tribunals.

4. Exchanges with stakeholders and principal findings

11. The Council notes that some general matters of concern were shared by a great number of stakeholders while others were only raised or indicated as problematic by particular groups or individuals. The present report will therefore identify matters of general concern first and then address those prioritized or raised on a more limited basis by some stakeholders.

II. Knowledge and understanding of the internal justice system

12. The Council notes the continued widespread lack of knowledge of the internal system of justice among staff members. It is a serious problem that adversely affects the integrity of the system. As its discussions with stakeholders have made clear, it is essential, first and foremost, that a user-friendly handbook in the working languages of the United Nations be developed that describes the various procedural options open to staff, the deadlines involved and the benefits and drawbacks of each approach. The handbook should be distributed to all staff and managers alike. In addition, efforts should be made to hold oral presentations on information about the internal justice system at the various work locations on an annual basis. Wherever feasible, staff unions and associations should be involved in the presentations to staff, the development of outreach materials and the follow-up on implementation and utilization.

Recommendations

13. Create a user-friendly handbook in the working languages of the United Nations that outlines the various options open to staff complainants and describes, in a realistic manner, the advantages and disadvantages of each, with particular references to limitation periods for filing claims.

14. Establish an ongoing and systematic outreach programme that engages both staff and managers at all levels, in particular the heads of duty stations, and includes the active participation of staff unions and associations.

III. Need for the consolidation of rules, regulations and administrative issuances

15. It is widely agreed among the stakeholders the Council met, including the judges, that the Organization needs to consolidate the rules, regulations and administrative issuances dealing with human resources and put them in a single, accessible online location. The Council understands from its meeting with the Office of Human Resources Management that it has begun, as a first phase, a process of identifying duplicate or contradictory provisions in different instruments with a view to abolishing or consolidating as necessary those that are outdated or contain inconsistencies. Steps should be taken to make sure that the process receives adequate resources. In addition, the concern was raised by some stakeholders that different interpretations of the same instruments have been made by human resources staff across the system. In the view of the Council, the oversight role performed by the Office should include a considered process of eliminating or minimizing sources of inconsistent interpretation, which, of course, complicates adjudications before the Tribunals.

Recommendations

16. Stronger oversight by the Office of Human Resources Management is needed in connection with ensuring system-wide consistency in the implementation and interpretation of human resources instruments.

17. The consolidation of human resources instruments should be considered a priority project of the Office of Human Resources Management, and the Office should be provided with adequate resources.

IV. Staff access to documentation and information

18. The Council understands the important role of the Management Evaluation Unit in providing an internal checking function for line managers. The Unit also plays a formal and direct role in the internal justice system by reviewing the decisions of line managers, resulting in the requirement that complaining parties must first present their claim within a defined time period to the Unit, except in disciplinary cases and administrative decisions based on the advice of technical bodies. Given the Unit's role, it is essential that staff complainants and their representatives be given appropriate access to the documents and other information relied upon by the Unit in making a recommendation adverse to the complaining party. Where feasible, such access should be provided to staff complainants before the Unit makes its final recommendation so that the complainant has an opportunity to state his or her position before the recommendation is made. Such access need not include evaluative material or the "full discovery" that might be ordered by a judge when formal proceedings commence.

Recommendations

19. Where feasible, and without compromising needed confidentiality, the Management Evaluation Unit should provide complaining parties with documents and other information relied upon by the Unit in deciding to sustain the decisions of line managers, preferably before any final recommendation is made.

20. The Management Evaluation Unit should continue issuing its "lessons-learned" guides and disseminate them widely among managers and staff.

V. Protection from retaliation

21. Protection from retaliation has been the subject of consideration by the Council for a number of years. Staff rule 1.2 (g) expressly prohibits retaliation and attempts at retaliation. The Council notes that, following negotiations between staff unions and management in the framework of the Staff-Management Committee, the Secretary-General revised the bulletin on protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations (ST/SGB/2017/2).

22. Section 1 of the bulletin reiterates that it is the duty of staff members to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action. The duty to report is balanced with the right to be protected against retaliation. Any retaliation against individuals who have reported misconduct or who have cooperated with audits or investigations is in violation of the fundamental obligation of all staff members to uphold the highest standards of conduct of international civil service. The "protected activities" include such actions as reporting wrongdoing/misconduct (whistle-blowing) or cooperating in good faith with a duly authorized investigation or audit (see ST/SGB/2017/2, sect. 2.1).

23. While the Council notes the progress that has been made in strengthening protection from retaliation for engaging in the designated protected activities, it highlights the continuing gap with regard to protection against retaliation for lodging a case with the Tribunals or appearing as a witness before the Tribunals to support a case against the Administration. In fact, the Interim Independent Assessment Panel concluded that the system offered no protection against retaliation for reasons other than reporting misconduct (see A/71/62/Rev.1, para.

246). The Panel found that there is no express provision or prescribed procedure to protect such staff members from retaliation.

24. Discussions with staff stakeholders indicate substantial fear of retaliation among staff, which is a critical factor that has serious implications for access to justice. It is noteworthy that the report of the Interim Independent Assessment Panel reaffirmed the "widespread fear of retaliation and adverse repercussions on the part of staff for using the system" (see A/71/62/Rev.1, para. 103).

25. The judges have raised the issue of retaliation, or the threat thereof, against witnesses or applicants before the Tribunals. On the question of what protection may be afforded to witnesses who fear retaliation for the provision of testimony before the United Nations Dispute Tribunal, it was held that, while the statute and rules of procedure of the Tribunal are silent on the protective measures that may be ordered for the purposes of witness protection, the rules give the court the broad power to, at any time, either on an application of a party or on its own initiative, issue any appropriate order or direction for the fair and expeditious disposal of the case and to ensure justice to the parties.[1] The Dispute Tribunal further stressed:

> Witnesses appearing before this court will, most always, fear for their livelihood; they will fear intimidation and retaliation in the exercise of their functions, and to the very security of their jobs. In these cases, it is not the public that these witnesses will fear; rather, it is the Secretary-General or agents acting under his authority.
>
> It is imperative therefore that staff members can be confident that it is safe for them to testify before the Dispute Tribunal. In the absence of such an assurance, it is most unlikely that witnesses will come forward.[2]

26. The Dispute Tribunal has restated the "universal truth that reliable evidence which include the testimonies of witnesses are critical to the work of Courts and Tribunals in the dispensation of justice", and has qualified appearing before it as a protected activity for which staff members may not be subjected to any kind of harm or the compromise of their career as a result.[3] The United Nations Appeals Tribunal has reaffirmed that the Dispute Tribunal has the inherent power to order the protection of witnesses testifying before it from retaliation.[4]

27. Despite all that, the Council was informed of instances in which protective measures ordered by a judge had not been carried out by the Administration. The concern among some staff members is that seeking to rectify unlawful decisions before the Tribunals could lead to grave consequences for staff, such as the termination or non-renewal of their contracts under the pretext of lack of funds, or the restructuring or discontinuation of the post. The fear of such retaliation was more palpable for staff members who were on precarious or short-term contracts, since the chances of reversing the retaliatory decision to separate such staff, or suspending that action, are considered to be low.

28. The protection gap is further aggravated by the fact that the revised Secretary-General's bulletin ST/SGB/2017/2 appears to exclude Tribunal witnesses and applicants from its protection. The written submission received by the Council on 30 May 2017 from the Ethics Office acknowledged that providing testimony before the Dispute Tribunal did not qualify as a protected activity under the bulletin. Therefore, instances of retaliation against tribunal witnesses did not fall within the scope of ST/SGB/2017/2 and lay outside the protection review by the Ethics Office.

[1] See order No. 25 (NBI/2010) in the case of UNDT/NBI/2009/067 (*Kasmani*).
[2] Ibid., paras. 33-34.
[3] See order No. 250 (NBI/2014) in the case of UNDT/NBI/2013/083 (*Nyasulu*), para. 12.
[4] See 2015-UNAT-544 (*Nartey*), para. 62.

In that connection, the Appeals Tribunal has ruled that the Dispute Tribunal exceeded its competence in receiving the Ethics Office's decision declining to review a retaliation case against a witness who had testified in the *Kasmani* case.[5]

29. During the stakeholder consultations, the representatives of the Administration recalled that staff rule 1.2 (g) provides that "staff members shall not disrupt or otherwise interfere with any meeting or other official activity of the Organization, including activity in connection with the administration of justice system, nor shall staff members threaten, intimidate or otherwise engage in any conduct intended, directly or indirectly, to interfere with the ability of other staff members to discharge their official functions". Furthermore, the Council learned that prohibition against reprisals in the general sense of the term was included under the policy on prohibition of harassment and abuse of authority in the workplace (ST/SGB/2008/5). However, that professed position, which prohibits retaliation against witnesses and complainants before the Tribunal, does not explicitly provide protection to those who face retaliation. In fact, the Council has heard statements from staff representatives and some management representatives that an express and strengthened policy is needed to address cases of harassment and the abuse of authority.

30. Effective protection against retaliation is an essential attribute of a fair and effective system of internal justice. Despite the express policies protecting individuals who report misconduct, there is no equivalent protection for parties or witnesses before the Tribunals. An express set of safeguards is needed lest willingness to invoke the internal justice system be chilled by the fear of retaliation.

31. The Council notes resolution 71/266 of the General Assembly, in which the Assembly requests the Secretary-General to report on measures taken to strengthen measures for protection against retaliation in his future reports. At present, the reporting in that context will not provide for an express policy that protects parties and witnesses from retaliation for invoking the internal justice system. The Internal Justice Council reiterates the recommendation of the Interim Independent Assessment Panel that the Organization establish legal provisions and corresponding procedures to protect staff members from retaliation for appearing as witnesses or for lodging an appeal (see A/71/62/Rev.1, para. 413, rec. 24).

32. The Council therefore calls for a thorough review of the protection against retaliation in the internal justice system with a view to putting in place an effective mechanism to ensure protection for witnesses and complainants before the Tribunals. It recommends that the General Assembly consider that important issue at its seventy-second session.

Recommendation

33. Establish an explicit system-wide policy protecting both parties and witnesses before the Tribunals from retaliation.

VI. Self-represented staff complainants

34. Statistics from the Office of Staff Legal Assistance indicate that, in 2016, 67 per cent of staff claimants before the Dispute Tribunal were self-represented. Another
8 per cent were represented by private counsel, 4 per cent by volunteer counsel and

[5] Ibid., para. 66.

21 per cent by the Office. During the same year, 38 per cent of appellants were self-represented. The Council was informed that 2016 was not an aberrational year.

35. The high degree of self-representation before the Dispute Tribunal was a matter of extensive discussion with all stakeholders. The causes are difficult to understand given the fact that the Office of Staff Legal Assistance is available to staff as a cost-free resource. Undoubtedly, some degree of self-representation is a result of the fact that sometimes the Office makes a determination that a complaint lacks merit, and the complaining party simply disagrees and wishes to pursue his or her claim with the Tribunal. Some stakeholders reported that one of the reasons for self-representation might be a lack of knowledge of the system and/or of the existence of the Office of Staff Legal Assistance, a problem the Council addresses above. Others reported that the Office's services were not sufficiently available to those staff who are remotely located.

36. Others informed the Council that the Office of Staff Legal Assistance sometimes declines to provide representation owing to limited resources or undue caution by the Office in determining that there is no "reasonable expectation of success". It may also be true in a few cases that the staff complainant might believe he or she is a better advocate for the cause than the counsel provided; in some cases, perhaps supported by staff representatives, the self-represented complainant prevails in the Tribunal.

37. The fact that 67 per cent of staff complainants are self-represented before the Dispute Tribunal raises a significant concern with regard to staff access to legal representation. The Council at the present juncture cannot explain why such a high level of self-representation obtains in a system where staff legal assistance is available free of charge through the Office of Staff Legal Assistance. It is an area that requires further exploration and a report to the General Assembly at its next session. In particular, the Council looks forward to receiving data from the Office of Staff Legal Assistance in a form that helps it understand in better detail why such a large percentage of staff represent themselves before the Dispute Tribunal. If a principal cause is a lack of resources, then additional resources should be provided, because representation by competent advocates is essential to a fair system of internal justice, particularly when management is represented by counsel. Consideration should also be given to the training and credentialing of staff representatives and other interested staff and retirees, who may be interested in serving as peer advocates in cases where the Office of Staff Legal Assistance has declined to provide representation.[6]

Recommendation

38. The high incidence of staff complainants representing themselves before the Dispute Tribunal is an issue that must be further investigated throughout all duty stations so that it is fully addressed.

VII. Referrals for accountability from the Tribunals

39. The General Assembly has paid considerable attention to ensuring accountability in the Organization. In its resolution 68/264, the Assembly emphasized the importance of real and effective accountability at all levels, including criminal accountability (paras. 22 and 26), and requested the Secretary-

[6] Some of the resolutions of the General Assembly that mention recourse to volunteers are 63/253, 64/119 and 65/251.

General to take all measures to ensure that staff, in particular senior managers, are held accountable for their actions (para. 27).

40. In fact, in the establishment of a new system of administration of justice, the General Assembly had a broader objective in mind: "to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike" (see resolutions 61/261 and 63/253). The Assembly has repeatedly affirmed that all staff, in particular senior managers, are expected to operate within a framework of regulations, rules and administrative issuances enforced by Tribunals presided over by an independent and professional judiciary.

41. For that reason, the statutes of the Dispute Tribunal and the Appeals Tribunal, in articles 10.8 and 9.5, respectively, provide that the Tribunals may refer appropriate cases to the Secretary-General or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

42. Referrals for accountability by the Tribunals should therefore be seen as a recognition of the authority and obligation of the Secretary-General to hold staff accountable. They serve as a tool to help the Secretary-General ensure that staff members, including managers, are held accountable for their action or inaction.

43. Accountability issues regularly appear in the internal dispute resolution process. From the inception of the new system of justice in 2009 to June 2017, there have been 24 referrals for accountability: 23 by the Dispute Tribunal and 1 by the Appeals Tribunal. Of the 23 referrals by the Dispute Tribunal, 10 judgments were vacated by the Appeals Tribunal, whose judgments included explicitly vacating the referrals and vacating the appealed decision without invoking the referral.

44. A significant number of the stakeholders the Council met with highlighted the issue of accountability as an ongoing concern. There was a shared sentiment that the system of referrals for accountability was not functioning well. Many referred to an information gap and the fact that little feedback was provided to the Tribunals or staff members on the action taken against the managers concerned. There is no record of action taken by the Secretary-General or the Office of Administration of Justice in that respect.

45. A failure to take action on a referral for accountability from one of the Tribunals is a significant problem for the internal justice system. Failure to investigate referred cases and impose sanctions where misconduct has been established, and to be seen doing it, means that there is no disincentive for engaging in wrongdoing, creating a sense of impunity. In order to effect change in the Organization, the accountability function ought to be enhanced.

46. The system of referrals requires modification if the goals of the General Assembly with regard to ensuring accountability are to be met. For a start, procedures must be established and publicized to trigger follow-up action by the Organization on the referrals of accountability. At the same time, the identities of those persons being referred should be protected until appeals have been exhausted.

47. Consideration of the reform of the referrals system is timely. In December 2015, in its resolution 70/112, the General Assembly requested the Secretary-General to ensure the accountability of managers whose decisions have been established to be grossly negligent, according to the applicable Staff Regulations and Rules of the United Nations, and which have led to litigation and subsequent financial loss, and to report thereon to the Assembly at its seventy-first session. A year later, in its resolution 71/266, the Assembly encouraged the Secretary-General to proactively engage in a process to review referrals for accountability as well as other potential options for accountability, with the aim of ensuring the enforcement

of accountability, and to report thereon to the General Assembly at its seventy-second session.

48. Management must take seriously referrals for accountability from the Tribunals. Such referrals, while relatively rare, identify alleged instances of serious management misconduct that require prompt and visible attention by the Secretary-General, beyond the usual remedies afforded in a case.

Recommendation

49. The system of the referrals for accountability should be improved with an eye to ensuring prompt management action that follows up on such referrals, to prevent the weakening of the statutory referral clauses and the organizational culture of accountability.

VIII. Independence and autonomy of the Tribunals

50. When the General Assembly adopted resolution 61/261, it transformed the then-existing dispute resolution regime into a system of administration of justice, which includes the Dispute Tribunal and the Appeals Tribunal as two independent bodies performing the judicial function of the system. In establishing it the Assembly resolved to create a system of administration of justice that was "independent, transparent, professionalized...[and] consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike".

51. In resolution 61/261, and in other resolutions, the General Assembly enjoins each stakeholder to perform their role, function and duty towards the realization of justice with the necessary good faith and commitment. Furthermore, as with all Assembly resolutions, the Secretary-General relies on his team of executive officials to ensure the successful follow-through or implementation of that resolution.

52. A recurring concern raised in the Council's consultations with stakeholders is the existing tension which persists in the interpretation of the notion of judicial independence between the judges and management. The judges of the Tribunals, experienced in the judicial role and function and believing firmly in the principle that judges must at all times perform and fulfil their adjudicatory role and function without fear, favour or prejudice, understandably emphasize the importance of judicial independence from the Administration, with respect to both the reality of independence and the appearance of independence.

53. If the system is structured in ways that give the impression that the Administration controls or is in charge of the Tribunals and the judges, it compromises the trust that litigants must have that the judges will render an impartial opinion based on the facts and applicable law, not the wishes of management.

54. One area of concern expressed by stakeholders is management's failure to follow up on referrals for accountability by the Tribunals. Failure of follow-through creates the reasonable impression that management will not act against its own, even when they are found by the Tribunals to be engaged in serious wrongdoing.

55. Another area of concern is the question of the linkage of the compensation of Dispute Tribunal judges with that of the staff. The judges have expressed disquiet that their emoluments have been expressly linked to that of the staff and are subject to the same conditions, although the Secretary-General has articulated the view that

such linkage does not imply that the judges are staff but merely that their emoluments are measured as equivalent to that of staff holding posts at the D-2, step IV, level. Because the compensation or emoluments of staff at that level have recently been restructured in a manner resulting in reductions, the judges fear that their compensation or emoluments will be similarly reduced.

56. The Council notes that, because the remuneration of judges is part of their conditions of service, the remuneration becomes, intrinsically, an issue of judicial independence. It has an impact on the independence and impartiality of judges. When remuneration for judicial service is reduced at the discretion or at the instance of the Administration, there is concern that such reduction will inhibit judges in the exercise of their judicial function against the Administration. When remuneration for judicial service is expressly linked to staff remuneration, litigants may well perceive the judges as simply another branch of the staff, not the independent and impartial arbiters of justice that they are.

Recommendation

57. The judges serving on the Tribunals are independent, impartial arbiters responsible for rendering justice on the basis of the facts and applicable law. They are not staff members of the United Nations and should not be linked with the staff in terms of their compensation and emoluments. With respect to their judicial decision-making, they enjoy full autonomy and are not subject to management oversight. The Council recommends that a review of all policies and procedures be carried out to ensure adherence to that basic principle of judicial independence and autonomy. Furthermore, the Council recommends that the Office of Human Resources Management submit for the consideration and approval of the General Assembly a revised compensation package for the Dispute Tribunal judges that negates the equivalency linkage to staff compensation, on a "no loss, no gain" basis.

IX. Additional efficiency and effectiveness issues

58. One of the stated objectives of the General Assembly in establishing the new administration of justice system in 2008 is that it should be, inter alia, "adequately resourced" (see resolution 61/261, para. 4). In determining its own work programme for the period 2016-2017, the issue of "adequate resources" was not a designated topic for the Council's discussion with stakeholders. Nevertheless, it was repeatedly raised by stakeholders as a problem in terms of operational efficiency in the following particular areas.

A. Resources for interlocutory motions filed between sessions of the United Nations Appeals Tribunal

59. As noted in the previous report of the Internal Justice Council, in its early years the Appeals Tribunal established an informal intersessional "duty roster" which essentially relied on the goodwill and professionalism of the judges to take on, without compensation, interlocutory motions. Eventually that volunteer situation withered away and the void has been largely filled solely by the President of the Appeals Tribunal acting on "urgent" motions, with "non-urgent" matters left for the next session. The Office of Administration of Justice has informed the Council that there have been an average of 51 interlocutory motions each year over the past seven years.

60. The Council is of the view that judicial service on interlocutory motions be appropriately compensated rather than rendered on a volunteer basis. Lack of compensation is not only unfair to the judges but also produces unnecessary delay.

Recommendation

61. The duties performed by judges in deciding interlocutory motions between sessions of the Appeals Tribunal should be compensated, rather than rendered without additional compensation by the President as part of his or her overall duties.

B. Consultation with stakeholders on the preparation of budgets

62. The Executive Director of the Office of Administration of Justice is responsible for preparing budget requirements for all of the functions the Office is tasked with managing or supporting, including the Registrars, the Office of Staff Legal Assistance, the Appeals Tribunal, the Dispute Tribunal and the Internal Justice Council. During the course of the Council's meetings with the concerned stakeholders there was a consensus on the need for enhanced consultation with the affected entities on their budgetary needs and prospective requirements.

Recommendation

63. All units of the Office of Administration of Justice should be consulted on their resource needs for the preparation of budgets.

C. Judicial efficiency

64. As a follow-up to comments from various stakeholders, the Council seeks further information from the Office of Administration of Justice on the amount of time that transpires between the filing of a case in the Dispute Tribunal and the decision resolving the case, and between the close of the hearing in the case and the judge's decision. Such data should be broken down between cases that are decided on the merits, and cases dismissed on the grounds of non-receivability (cases in which the other party is entitled to judgment as a matter of law, usually because the filing was out of time) or non-compliance with procedural requirements.

65. According to the information the Council has received from one of the three Dispute Tribunal venues, over a seven-year period it has taken the Tribunal an average of 213 days for cases to be dismissed on grounds of non-receivability. It may be that the 213-day average is skewed by the complexity of cases, the inevitable learning curve for the judges in the early years of the Tribunal and by a number of outlier cases (one judgment took 1,194 days). It appears, however, that the Dispute Tribunal has in recent years reduced the time taken to make non-receivability determinations. In 2016, the average duration for all Dispute Tribunal cases was 81 days, and in 2015 it was 96 days.

66. The Council was also provided with data on cases that the Dispute Tribunal did decide on the merits. From 2009 to the date of writing, for disputes involving staff in peacekeeping missions, the Dispute Tribunal sitting in Nairobi required an average duration of 501 days for judgments rendered in full for the winning staff member and 477 days for judgments rendered in part for the staff member. Cases coming out of the missions undoubtedly will take longer to process because of the distances involved, which explains in part the durational figures.

67. A quick review of the average durational figures over the same period for other Dispute Tribunal cases shows that the duration from filing to judgment

appears to be unnecessarily long, in a number of cases exceeding a year. Here too, however, average duration figures have improved, from 315 days in 2015 to 137 days in 2016.

68. The Council is not able at the present time to fully evaluate what the durational figures signify. It does wish to note that a delay in justice may itself be an injustice. In particular, the expiry of time will complicate the feasibility of reinstating to their positions individuals whose claims are ultimately sustained on the merits. It is an area that requires, in the first instance, careful review by the Dispute Tribunal judges under the guidance of its President, using meaningful data provided by the Office of Administration of Justice. The Council notes, in that regard, that the code of conduct for the judges of the Dispute Tribunal and Appeals Tribunal, adopted by the General Assembly in its resolution 66/106, provides in article 7 that judges must perform their duties "diligently" and "promptly" and, in addition, provides for a three-month time period for issuing judgments from the end of the hearing or the close of pleadings for cases heard by the Dispute Tribunal. The President of the Dispute Tribunal is responsible for monitoring how long judges take to render decisions. Of necessity, such monitoring has to involve soft persuasion, which in most cases should suffice. If presented with a repeated problem, the President should take up the matter with the body of Dispute Tribunal judges for appropriate action.

Recommendation

69. The President of the Dispute Tribunal should monitor the durational period between the filing of a case and its disposition, both for cases dismissed for non-receivability and for cases resolved on the merits. If continuing problems are identified, they should be taken up with the individual judge or, if necessary, in a meeting of the members of the Dispute Tribunal.

D. Operational efficiency of United Nations Dispute Tribunal and the Registrars

70. On the basis of information gathered during its meetings with stakeholders, the Council notes the existence of a lack of clarity with regard to the precise responsibilities of the Tribunal judges and those of the Registry staff with particular respect to the drafting and issuance of judgments. There also appears to be an issue requiring some clarification with respect to the supervision of Registry staff in their work, as they serve the judges in their work but remain under the authority of the Executive Director of the Office of Administration of Justice. In other words, their duties are somewhat mixed, as they function both as clerks for the judges and as assistants to the Registrars. As conveyed to the Council, the lack of clarity is a source of continuous and unwanted friction between some judges and some Registry staff, affecting productivity and morale.

71. The Council understands that the attention of both the President of the Dispute Tribunal and the Principal Registrar have been directed to that unsatisfactory state of affairs. Both have taken some action to deal with the situation, but the friction continues to exist. The Council notes that the friction seems to centre on the preparation of judgments and the division of work. Moreover, some judges complained of judgments being "revised" without their knowledge and needing to "persuade" Registry staff of their views. On the other hand, Registry staff complained in some instances of having "to do everything" and that some of the judges were wanting in their judicial temperament and capacity.

72. The Council is not in a position to judge the merits of the complaints. The Council believes the issue warrants more attention from the Dispute Tribunal and from the Office of Administration of Justice than perhaps has heretofore been the case.

Recommendation

73. The respective responsibilities of Tribunal judges and Registry staff should be clearly delineated, so that the judges have the necessary staff assistance for their decisional duties, including assistance that is also responsive to their directives.

E. Dealing with operational efficiency: role and authority of the President of the United Nations Dispute Tribunal

74. The judges enjoy necessary institutional autonomy. They are not staff members subject to review by the Office of Administration of Justice. The contrary is true for staff members subject to the Secretary-General's supervision. However, as mentioned above in connection with the duration of time between filing and judgment, the judges have a significant impact on operational efficiency. The Council believes that in such matters, the President of the Dispute Tribunal should assume responsibility for monitoring such issues. The Council notes that article 1 of the rules of procedure of the Dispute Tribunal, as set out in General Assembly resolution 64/119, provides for the election of a President "to direct the work of the Tribunal and of the Registries, in accordance with the statute of the Dispute Tribunal". That accords with article 4.7 of the statute of the Dispute Tribunal, which provides that "the Dispute Tribunal shall elect a President, who shall have the authority, inter alia, to monitor the timely delivery of judgments". That authority, the Council believes, is sufficient for the modest but essential monitoring role the Council envisions. Additional supervisory authority would require action by the General Assembly and might be considered inconsistent with the emphasis on collegiality in the code of conduct for the judges of the Dispute Tribunal and the Appeals Tribunal approved by the Assembly in resolution 66/106. Article 4, paragraph (h), of the code of conduct provides that "judges should use their best efforts to foster collegiality in the Tribunals" and "respect the dignity of others, including members of the Tribunal staff".

Recommendation

75. The relevant rules of procedure and statutes should make clear that the Presidents of the Tribunals have a monitoring responsibility consistent with the collegial nature of those bodies

F. Adequacy of resources

76. The Management Evaluation Unit is a part of management and has been described as management's "last opportunity" to examine whether a challenged decision has been properly taken or not. It deals with some 920 cases each year, which roughly equates to 4 cases received each business day. Notwithstanding very tight statutory deadlines, the Unit settles 20 per cent of the cases and produces fully reasoned explanations on the merits for staff filing requests for management evaluation. Variously described as a "value for money", "high quality" operation, the Unit suffers from a lack of sufficient resources to handle the constant flow of new cases and the pressure of having to advise management with its evaluations in a timely manner. It also produces a quarterly "lessons learned" report that is well regarded and resorted to for guidance by line managers. In order to operate

efficiently, the Council's sense is that the Unit requires one additional post of Legal Officer and one additional post of Legal Assistant. In addition, in the closing days of the preparation of the present report, the Council came to understand that a post at the P-3 level had been eliminated from the Unit. No doubt that will contribute further to the Unit's challenges in delivering what is required of it.

77. In terms of current budgetary support, the Office of Staff Legal Assistance is worse off than the Management Evaluation Unit. It is partially funded by the voluntary supplemental funding mechanism (see resolution 71/266, para. 38) and described itself to the Council as a "bare-bones operation" where the lack of resources, including 9-year-old laptop computers and no travel funds, was its "biggest problem" in meeting its mandate. The problem has been reported on by the Interim Independent Assessment Panel and the Council in prior reports.

78. The Office of Staff Legal Assistance suffers in particular from the lack of a career path for staff owing to the absence of a post at the P-4 level in the Office. That negatively affects operational efficiency, as staff members at the P-3 level necessarily look for opportunities elsewhere, taking their experience and knowledge of the internal justice system with them. Indeed, the Office "lost" two experienced legal officers at the P-3 level in 2016 owing to that reason. As a consequence, the Office is burdened by a relatively high turnover of professional staff. As previously discussed, that lack of resources and continuity of experienced staff may affect the Office's capacity to provide representation in all meritorious cases. In addition, the Office, which is the only office that deals with every aspect of the administration of justice system (i.e., the Management Evaluation Unit, the United Nations Ombudsman, the Dispute Tribunal and the Appeals Tribunal) also encounters hierarchical issues when its relatively younger staff meet with senior staff who sometimes have expressed concern about being challenged on their decisions by much younger colleagues. The Council notes that the Office's operation is extremely well regarded by the Dispute Tribunal judges and other stakeholders. It provides, as described by one of them, an "invaluable service" to staff — obviously, only to the extent it is provisioned to do so. In that regard, the Council postulates that, if one considers the Office's high level of effectiveness under subpar conditions, what more could it do if better resourced? For that reason the Council strongly recommends that the General Assembly consider ways and means to bolster resources available to the Office of Staff Legal Assistance, including the establishment of a post at the P-4 level for each duty station.

Recommendation

79. The Management Evaluation Unit and the Office of Staff Legal Assistance require an increase in resources to meet their responsibilities, ensure more senior expertise to address more complex cases and mentor junior lawyers and limit staff turnover.

X. Miscellaneous issues

A. Rescission/specific performance as a remedy

80. Article 10.5 of the statute of the Dispute Tribunal provides that, in a judgment rendered in favour of the applicant involving "appointment, promotion or termination" the Tribunal must, in lieu of rescission of the contested decision or an order of specific performance, set an amount of compensation that the respondent may elect to pay as an alternative. Article 9.1 of the statute of the Appeals Tribunal provides for the same election for a respondent.

81. According to the Council's discussions with stakeholders, it appears that management invariably adheres to a policy of "no rescission/no reinstatement" irrespective of the strength of the winning staff member's case or the degree of manager misconduct or dereliction of duty determined by the Tribunal to have occurred.

82. The Council notes that the "policy" reaches back decades ago during the time of the former United Nations Administrative Tribunal. While in many cases there may be valid grounds for management's decision not to reinstate but rather pay money instead, rigid application of the policy, as the judges have stated in their rulings, does not serve justice in every instance.

Recommendation

83. The General Assembly is urged to mandate that Tribunal judges may, in appropriate cases, order restoration/reinstatement and are not required to fix payment in lieu of such restoration in cases where the claimant has prevailed. The Assembly should also urge management to seriously consider reinstatement rather than automatically opting for the payment of compensation in lieu of restoring the staff member to his or her position.

B. Standing of staff associations to file applications on their own behalf and on behalf of staff members as individuals or as a class of similarly situated staff members

84. In meetings with the Council, staff unions and associations expressed strong interest in the recognition of their legal standing under the statutes of the Dispute Tribunal and Appeals Tribunal to file applications concerning issues affecting the association as well as on behalf of individual staff members and, more broadly, on behalf of a group of similarly situated staff appealing the same administrative decision by management. The issue has previously been before the General Assembly, and in paragraph 15 of its resolution 63/253, the Assembly decided to revert to the issue of staff associations filing claims in the system of justice at its sixty-fifth session.

85. The Council believes it is time to revisit the issue. It intends to take up the matter in the coming year and provide the General Assembly with its considered views in its next report.

C. Location of Tribunals

86. Tribunal judges have consistently raised the issue of the inconvenience and symbolic impropriety of lodging the Tribunals and their services within the same premises as that of the Office of Administration of Justice and so close to other departments of the United Nations. The Council is aware of the problems with space availability at the United Nations and the need for rational, cost-effective allocation of offices in New York. The Council also acknowledges the efforts made by the Office of Administration of Justice to secure the privacy of operations of the court and to segregate its activities and facilities from the Tribunals.

87. Notwithstanding the foregoing, the Council shares the concerns of the Tribunals, especially their legitimate desire to be clearly seen as a distinct organ from the executive branch. An effort should be made to ease access for those concerned, including, for example, external counsel, relatives and witnesses, to attend hearings. In the Council's view, the current location of the Office of Administration of Justice in the DC-2 building, which shares space with other units

of the United Nations, including the Mediation Support Unit of the Department of Political Affairs, does not meet the needs of the Tribunals, in particular the need to be better seen by staff and delegates publicly discharging their duties and dispensing justice.

Recommendation

88. The General Assembly is urged to request the Secretary-General to consider whether the location of the Tribunals may be changed to facilitate access by non-staff to hearings and to physically separate the Tribunals from the facilities of the Office of Administration of Justice.

D. Investigations and disciplinary matters

89. As indicated by the former Council, the new framework on investigations and disciplinary matters that is being developed along the lines decided by the General Assembly (see resolutions 62/228 and 62/247), would represent a significant improvement in due process and the rule of law as related to the internal justice system of the United Nations.

90. The Council is aware that the thorough and dedicated joint work between legal and investigative teams from management and staff took nine years and that a final draft was agreed upon in 2016 aimed at meeting the requirements of the General Assembly, among others, on the protection of due process rights, respect for the rule of law, adequate investigations standards and the protection of staff privacy rights.

91. The Council understood from stakeholders that the future policy might have a beneficial impact on investigations relating to prohibited conduct such as discrimination and harassment, including sexual harassment, and the abuse of authority, among others, which according to many stakeholders currently lack an appropriate framework to make them trustworthy and fair.

92. Moreover, the role played by properly conducted investigations on sexual harassment, which could lead to the identification of possible evidence of criminal conduct such as sexual exploitation and abuse, and therefore to the intervention of specialized entities such as the Office of Internal Oversight Services, is undeniably crucial.

93. The Council will continue its follow-up of the issuance of that important draft policy to assess its future impact in the development of the internal system of administration of justice.

XI. Acknowledgements

94. The Internal Justice Council wishes to express its gratitude to all the stakeholders for their availability and for their clarifying and constructive contributions both during the interviews and after. Their input was crucial to the understanding of many problems and to the construction of the recommendations incorporated in the present report.

95. The Council is further indebted to the Office of Administration of Justice for its support, understanding and attention to the Council's requirements and the tireless follow-up of its requests.

(*Signed*) Yvonne **Mokgoro**

(*Signed*) Carmen **Artigas**

(*Signed*) Samuel **Estreicher**

(*Signed*) Frank **Eppert**

(*Signed*) Jamshid **Gaziyev**

Annex I

Views of the United Nations Appeals Tribunal

Comments of the United Nations Appeals Tribunal

Overview

1. The United Nations Appeals Tribunal is the final arbiter of the administration of justice system for staff members of the United Nations, the United Nations Relief and Works Agency for Palestine Refugees in the Near East, the International Civil Aviation Organization and several other international agencies and entities, as well as for participants of the United Nations Joint Staff Pension Fund.

2. The Appeals Tribunal, which is itinerant in nature, adjudicates on appeals at least two, usually three, times each year (second, third and fourth quarters) for two-week sessions at each interval. The Appeals Tribunal consists of a complement of seven judges of different nationalities and legal systems. The work of the Tribunal involves the adjudication of appeals from the judgments rendered by the lower tribunals and the decisions taken by the heads of the international agencies and entities that have accepted the jurisdiction of the Appeals Tribunal, as well as the review and disposal of interlocutory motions, which are filed by parties. At each session, the judges of the Appeals Tribunal are required to deliberate on the matters, write judgments and issue orders accordingly.

3. As at 30 June 2017, the Appeals Tribunal had received 1,098 appeals and disposed of 986 of them. It is important to note that, where applications are similar in nature, the Tribunal consolidates the cases and disposes of them in one judgment, even if they relate to different staff members.

Challenges

Inadequate staffing of the Registry

4. The Registry's staff performs various registry duties and the duties of legal officers. To that end, the staff are engaged in preparatory work before the actual sitting of the Tribunal and are also involved in the work of the Tribunal during and after each sitting. The Registry staff make all the arrangements for each session of the Tribunal, including the drafting of briefing notes for judges. The briefing notes include the review and citation of the relevant facts, the parties' contentions, legal issues, case law and administrative issuances related to the particular appeals. The staff attend the judges' panel deliberations unless otherwise instructed by the judges, provide legal and administrative support in relation to oral hearings and prepare and assist at the plenary meetings. They are also required to edit, finalize and publish all judgments as well as to manage the daily affairs of the Appeals Tribunal under the guidance of the President. When time permits, the staff also maintain a digest for internal use, which seeks to capture the Appeals Tribunal's growing body of jurisprudence to facilitate research and the onboarding of new judges and Registry staff.

5. In order to achieve and maintain an efficient and effective system of administration of justice in the United Nations, it is imperative that the human resources at the Tribunal's Registry be up to capacity. Currently, the staff of the Registry comprises a Registrar, two legal officers and two assistants. The number of staff is insufficient to adequately perform the myriad tasks and functions of the Tribunal. It is important therefore that active consideration be given to increasing the capacity of the Registry staff of the Tribunal. To that end, it is strongly urged and highly recommended that the Tribunal be provided with two additional staff

members, namely, a legal officer and an assistant. That would lend to the more efficient and productive functioning of the Tribunal and a more effective system of administration of justice.

Reinstatement of duty judge system on a remunerated basis

6. The Appeals Tribunal receives and pronounces on all motions which are lodged by parties. Although many of those motions are filed when the Appeals Tribunal is not in session, they often require time-sensitive judicial attention and must be ruled upon promptly.

7. As a result, the judges of the Appeals Tribunal created an ad hoc "duty judge" system in July 2010 to address interlocutory motions and other judicial matters that might arise outside of the annual sessions. Under that system, the judges took turns, as designated by the President and on a monthly basis, performing judicial functions in between sessions. The duty judge system was set up entirely on the judges' own initiative, and they gave freely of their own time to dispose of the parties' motions in a timely manner.

8. The duty judge system played a critical role in assuring that the appellate cases proceeded through different procedural phases in a timely manner and in safeguarding against potential due process violations. However, owing to the inordinate demands on the time of the judges outside the time needed to review and decide on the appeals, the duty judge system could not be sustained, especially in the absence of any remuneration. Hence, the duty judge system ceased operations in 2014.

9. Currently, the motions are dealt with by the President of the Tribunal, who, owing to the sheer volume, cannot decide on all the motions. As a result, the President pronounces on the motions that are deemed urgent and postpones all other motions until the next session of the Appeals Tribunal. The obvious consequence of that change will be a backlog of cases over time, since it is simply not feasible to decide on all outstanding motions and all docketed appeals during a two-week session three times a year.

10. In the view of the Appeals Tribunal, the duty judge system should be reinstated so that the President or the duty judge may "direct the work of the Appeals Tribunal and of the Registry" on a continuous basis pursuant to article 2.1 of the rules of procedure of the Appeals Tribunal, and the duty judge should be compensated for reviewing and ruling on interlocutory motions and other judicial matters when the Appeals Tribunal is not in session.

Difficulties with the website and the Court Case Management System

11. In addition to the issues of staff shortages and the lack of remuneration for judicial work, the Appeals Tribunal judges face difficulties due to a lack of adequate support in terms of the website and the Court Case Management System. The difficulties are more acute for Appeal Tribunal judges because most of the time they are not at Headquarters but in their home countries, and they rely heavily on the technical support provided.

12. **Website**. The website of the Office of Administration of Justice in its current form does not provide adequate search functions, which makes it difficult to identify relevant case law, hampering the efficient preparation of cases for both judges and Registry staff. Among other aspects, there is no search function by topic and search terms are not highlighted.

13. **Court Case Management System and background files**. The Registry provides judges with hard-copy case files to prepare their cases before deliberations.

However, to get (remote) access, in particular to filings and essential documents from the first instance background file, both judges and Registry staff rely on the Court Case Management System. Owing to the way in which the uploaded background files are organized (e.g., lack of an index of existing documents, an inconclusive naming system), it is very time-consuming for both judges and Registry staff and often difficult, if not impossible, to locate a desired document and to evaluate whether there is a full record of the lower court proceedings. In addition, the Court Case Management System faces significant technical issues and is very slow and unreliable.

14. **Court Case Management System and statistics**. Moreover, the Court Case Management System is not equipped to provide the Appeals Tribunal with the necessary information for statistical purposes. The Tribunal Registry is forced to compile statistics, especially for the activity reports of the Office of Administration of Justice, with the help of very primitive methods such as manually completed Excel sheets.

Matters for consideration by the General Assembly

15. Accordingly, the Appeals Tribunal respectfully requests that the General Assembly address and determine the following:

(a) Whether the "pay per judgment" system [1] for judicial compensation should be replaced by either a flat daily rate or a stipend, either of which would remunerate judges for the work they perform during sessions as well as between sessions with regard to deciding and ruling on motions and addressing regulatory and administrative matters;

(b) Whether the President and/or duty judge should be financially compensated for deciding and ruling on interlocutory motions;

(c) The best solution for dealing with the management of interlocutory motions that are filed when the Tribunal is not in session.

[1] In addition, a payment system separated from the judgments would reduce potential conflicts of interest in connection with the distribution and/or consolidation of cases and with the decision as to whether or not to dissent from a judgment or postpone cases to the following session.

Annex II

Views of the United Nations Dispute Tribunal

INTRODUCTION

1. The report of the judges of the United Nations Dispute Tribunal includes important facts with regard to the Tribunal as well as its activities during the period from 1 July 2016 to 30 June 2017, and includes updated statistics. The report also provides a summary of the Tribunal's achievements during the period and identifies challenges for the future.

2. The Dispute Tribunal commenced operation on 1 July 2009 as the first instance tribunal of two tribunals providing formal internal dispute resolution in respect of matters arising from disputes between the staff and the United Nations concerning employment and disciplinary matters. The Tribunal refers matters for mediation where possible. The decisions of the Tribunal are such as to not only resolve disputes but also clarify the interpretation to be applied to the administrative issuances of the United Nations, and its decisions inform policy development. The Tribunal plays an important role in the review of disciplinary cases brought before it. It examines the specific complaints of an applicant in respect of the conduct of investigations, the observance of due process and the proportionality of any penalty imposed. The same is true in cases alleging abuse of power, harassment and retaliation against staff who have reported misconduct.

3. There are two major challenges. The first is the anticipated rapid rise in the work of the Tribunal. The second concerns the independence of the Tribunal.

4. The number of cases currently before the Tribunal has risen substantially. Owing to the current reforms and the consideration of future reforms in the United Nations, it is anticipated that the trend is likely to continue.

5. From its inception, the nature of independence of the Tribunal has lacked definition and does not appear to be understood within the hierarchy of the Organization, in that independence is being equated with a policy of direct non-interference by the executive branch in respect of judicial decisions, rather than with an international standard of judicial independence and autonomy.

6. It is to be noted that the Tribunal received a large number of newly registered cases: 438 in 2015, 383 in 2016 and 172 for the six months from January to June 2017. The Tribunal continues to deal with cases within its existing resources, while recognizing its general financial constraints.

7. The Tribunal has begun a pilot monthly dialogue with counsel from the Office of Staff Legal Assistance and the respondent to discuss issues and procedures. That issue is discussed further below.

8. During the reporting period, the Tribunal held two plenary sessions. The first, held in Geneva in November 2016, considered issues of procedure and ways of dealing with cases in a timely manner. The second, held in New York in May 2017, considered issues of independence and judicial autonomy. That plenary session included meetings with the Secretary-General and officials of the General Assembly and the Secretariat. Immediately following the plenary session, the judges held a workshop that addressed issues of procedure and legal policy and reviewed certain aspects of the applicable case law and general trends and developments in the law.

9. It is important for the future of the Tribunal and the internal justice system of the United Nations that the General Assembly, the Internal Justice Council and the judges address the key challenge of independence to ensure that the mandate of the Tribunal can be properly met.

President of the Dispute Tribunal

10. In accordance with article 1 of the rules of procedure of the Dispute Tribunal, during its plenary meeting in May 2016, the judges elected Judge Rowan Downing as President for a period of one year, from 1 July 2016 to 30 June 2017.

Judges of the Dispute Tribunal

11. During the reporting period, the Dispute Tribunal was composed of the following judges:

Memooda Ebrahim-Carstens (Botswana), full-time, New York

Teresa Maria da Silva Bravo (Portugal), full-time, Geneva

Rowan Downing (Australia), ad litem, Geneva

Alessandra Greceanu (Romania), ad litem, New York

Alexander W. Hunter, Jr. (United States of America), half-time

Nkemdilim Amelia Izuako (Nigeria), ad litem, Nairobi;

Agnieszka Klonowiecka-Milart (Poland), full-time, Nairobi;

Goolam Meeran (United Kingdom of Great Britain and Northern Ireland), half-time

Election of judges

12. The mandates of Judge Thomas Laker (full-time), Judge Vinod Boolell (full-time) and Judge Coral Shaw (half-time), who had been appointed for terms of seven years, expired on 30 June 2016. Judge Agnieszka Klonowiecka-Milart, Judge Teresa Maria da Silva Bravo and Judge Alexander W. Hunter, Jr., began their terms of seven years on 1 July 2016.

Deployment of half-time judges

13. During the reporting period, the two half-time judges completed tours of duty in New York, Geneva and Nairobi. Judge Meeran served two three-month tours of duty in Geneva from 15 August to 11 November 2016 and from 30 January to 30 April 2017. Judge Hunter was in New York from July to October 2016 and deployed to Nairobi from 1 January to 31 March 2017.

JUDICIAL STATISTICS OF THE Dispute TRIBUNAL

14. The Dispute Tribunal provided statistical information to the Office of Administration of Justice. That information was, in part, contained within its report; however, important references and footnotes were deleted. Below is the entire report, with the footnotes and references included in full. Without such information the judges are of the view that a full picture of the work undertaken and applications filed would not be fully presented. The statistics have been updated to include the period from 1 July 2016 to 30 June 2017.

General judicial activity of the Dispute Tribunal updated for the period from 1 January to 30 June 2017

15. During the period from 1 January to 30 June 2017, the Dispute Tribunal registered a total of 172 new cases (including 1 inter-Registry transfer). The Tribunal disposed of 108 cases and rendered 51 judgments.[1]

[1] The number of judgments does not equate to the number of cases disposed of because some of the cases were closed by orders of withdrawal or as a result of settlements following case management discussions. In addition, there were a number of instances when a single judgment was issued in relation to two or more cases that concerned similar issues.

16. Of the 108 cases disposed of between 1 January and 30 June 2017, 37 cases (34.25 per cent) were closed on withdrawal of application. Of those cases, 7 were closed following successful mediation and 30 were otherwise closed, including 20 cases closed following informal settlement between the parties.

17. As at 30 June 2017, 321 cases were pending.

18. As at 30 June 2017, Geneva had 151 pending cases; Nairobi had 90 pending cases; and New York had 80 pending cases.

General judicial activity of the Dispute Tribunal for the period from 1 July 2016 and 30 June 2017

19. Between 1 July 2016 and 30 June 2017, the Dispute Tribunal registered 333 new cases. During the same period, the Tribunal also disposed of 342 cases, whereas it had disposed of 310 cases in the period from 1 July 2015 to 30 June 2016. The Tribunal also took important decisions during the reporting period, which are briefly mentioned in the present report. During the reporting period, the Tribunal rendered a total of 177 judgments, issued 787 orders and held 221 hearings.

20. Overall, during the eight-year period of its existence, the Tribunal registered a total of 2,820 cases, disposed of 2,501 cases, rendered 1,468 judgments, issued 6,246 orders and held 1,852 hearings. As at 30 June 2017, the Tribunal had 321 cases pending.

Orders

21. During the relevant period, the Dispute Tribunal issued a total number of 787 orders. The breakdown per Registry was as follows: Geneva, 242 orders; Nairobi, 290 orders; New York, 255 orders.

22. The President of the Tribunal also issued two orders on requests for recusal of a judge and one order on the reassignment of a remanded case to a judge.

Hearings

23. During the reporting period, the Dispute Tribunal held a total of 221 hearings. Of those, 134 were on the merits, and 87 were case management hearings. The breakdown per Registry was as follows: Geneva, 82 hearings; Nairobi, 72 hearings; New York, 67 hearings.

24. Hearings are becoming the norm, with cases generally being only considered on the papers at the request of both parties and upon the conclusion by a judge that it is appropriate. Those matters considered on the papers upon the motion of the Tribunal generally involve only suspension of action applications and issues of obvious irreceivability (admissibility). Hearings are rarely held in respect of suspension of action applications, as such are based on prima facie findings on the basis of the material in an application and a reply, unless treated as an ex parte application. Case management discussions are undertaken in all substantive cases except those dealing with obvious irreceivability. The parties are encouraged to attempt mediation or otherwise resolve matters, where possible. The judges of the Tribunal have observed that when the issues, both legal and factual, are isolated and discussed with a judge in a case management discussion, there is an increased desire by the parties to proceed to formal mediation or informal settlement discussions.

Issues of independence

General considerations

25. In the previous report of the Internal Justice Council (A/71/158), the importance of an independent and professional judiciary was noted by the Council in paragraph 4. The Council further noted in paragraph 6 that:

> It is a characteristic of a mature legal system that all three elements of high authority — the Legislature, the Executive and the Judiciary — respect the separation of powers. This requirement is challenging especially in a hierarchical organization such as the United Nations, but it is nevertheless essential if the rule of law is to be respected.

More specifically, in paragraph 37 of its report, the Council addressed the issue of independence of the judiciary and the difficulty of achieving such in the United Nations by stating that:

> Effective access to justice requires that it is not only independent, but also seen to be independent by all those subject to its jurisdiction. In a hierarchical organization such as the United Nations, both the fact and appearance of independence may be more difficult to achieve than in a national jurisdiction. The Secretary-General is the chief administrative officer of the Organization and the respondent in appeals involving the Organization against decisions made by him or (more commonly) by those delegated to act on his behalf. It is important, therefore, that the Secretary-General and the senior members of the executive refrain from initiatives or conduct that may be interpreted as diminishing the authority and independence of the Tribunals, which have to rule on the validity of the exercise of that authority.

26. The judges of the Dispute Tribunal concur with the views expressed by the Internal Justice Council (see also A/71/158, paras. 38-63).

27. In a formal setting, independence of the judiciary is directly related to the separation of powers in respect of the arms of the governance structures of the United Nations. If there is no separation of power properly recognized and supported, not only do the necessary checks and balances not function properly in respect of the matters within the jurisdiction of the Dispute Tribunal and the Appeals Tribunal, but there can be no proper assertion of the rule of law or provision of justice for staff or the Organization. The Dispute Tribunal judges have serious concerns about the persistent lack of institutional autonomy and independence of the Dispute Tribunal, which runs contrary to General Assembly resolution 63/253. The Administration appears to operate upon an assumption that independence is protected as long as it refrains from exerting pressure on the results in individual cases. Judicial independence in a broader, institutional sense of autonomy and independence is structurally and practically absent, and has the effect of impeding justice being done and being seen to be done.

28. The most egregious manifestation of the denial of institutional independence was a statement on the official website of the Office of Administration of Justice maintaining that the Dispute Tribunal was an entity within the Office. Following the intervention of the judges, that information has been removed. However, perceptions have been shaped, and are still visible, for example, in the manual of the Office of Internal Oversight Services, which describes the Dispute Tribunal as an administrative body that hears and decides cases. In New York, where the Office of Administration of Justice is located, only the Office is mentioned on the floor where the New York Registry of the Dispute Tribunal is also located, leading to the appearance that the chambers of the judges of the Dispute Tribunal and the Appeals Tribunal, together with the courtroom, are effectively part of the Office of Administration of Justice. In addition, there have been instances in which senior managers and litigants alike have resorted to reporting their grievances about certain decisions, directives and resolutions of the body of judges of the Dispute Tribunal,

and the decisions of individual judges, to the Executive Director and/or the Principal Registrar of the Office of Administration of Justice.

29. The lack of recognition of judicial autonomy manifests itself in several aspects that are vital to the functioning of the Dispute Tribunal: the set-up and functions of the Office of Administration of Justice; the insecure status and conditions of service of judges; the denial of a role in deciding budget, training needs and staffing; the denial of the any role in legislative process concerning laws related to the functioning of the Tribunal; and the blocking of a dialogue with the General Assembly, as a legislative body. In all those aspects, international standards of judicial independence are being breached. The concerns of the judges of the Tribunal were the subject of a letter to the President of the General Assembly in October 2016.

30. A very serious problem arises from the fact that judges of the Dispute Tribunal are being treated by the Administration as staff, which has no basis in the governing laws. That approach hinders the discharge of the judicial function by leading to a conflict of interest. In May 2017, the Tribunal was presented with several cases filed in respect of the changes to the salary scale of staff. As the judges are remunerated based upon that scale, and not as part of an independent determination by law, the issue of a conflict of interest had to be considered. The Tribunal determined that the doctrine of necessity would have to be applied: that is, notwithstanding the direct conflict of interest, the judges of the Tribunal had no choice other than to deal with the cases, as there was no other way the parties would be able to litigate the cases.[2] That situation should not be repeated and the problem must be urgently addressed.

Set-up and functions of the Office of Administration of Justice

31. In paragraph 28 of its resolution 61/261, the General Assembly agreed to establish the Office of the Administration of Justice, headed by a senior management-level official, which would have overall responsibility for the coordination of the United Nations system of administration of justice.

32. The operation of the Office of Administration of Justice is governed by ST/SGB/2010/3, in which it is asserted that it is an independent office. Section 2 provides that:

> The Office of Administration of Justice is an independent office responsible for the overall coordination of the formal system of administration of justice, and for contributing to its functioning in a fair, transparent and efficient manner. In this regard, the Office provides substantive, technical and administrative support to the United Nations Dispute Tribunal and the United Nations Appeals Tribunal through their Registries.

33. There are a number of significant structural lapses compromising the independence of the Office of Administration of Justice. The Office is clearly compromised by sections 3.4 and 3.5 of ST/SGB/2010/3, which provide that:

> 3.4 The Executive Director advises the Secretary-General on systemic issues relating to the administration of internal justice, including by recommending changes to regulations, rules and other administrative issuances that would improve the functioning of the system of administration of justice.
>
> 3.5 The Executive Director prepares reports of the Secretary-General to the General Assembly on issues relating to administration of justice; liaises, as appropriate, on those issues with other offices; and represents, as necessary, the Secretary-General at meetings of intergovernmental bodies, international organizations and other entities on issues of administration of justice.

34. Those provisions clearly show that the Executive Director of the Office of Administration of Justice reports to and prepares reports for the Secretary-General,

[2] See order No. 113 (GVA/2017) in the case of UNDT/GVA/2017/020 (*Alcaniz*).

the only respondent before the Dispute Tribunal.[3] The Executive Director also represents the respondent at meetings. The position of the Executive Director is clearly not independent. It is further suggested that advising the Secretary-General on systemic issues and writing reports for the Secretary-General cannot be combined with "providing substantive, technical and administrative support" to the Dispute Tribunal and the Appeals Tribunal. The former should be placed with the Executive Office of the Secretary-General or the Office of Legal Affairs. The latter requires embracing the support function and acting in the interests of justice in priority over any other interests. The Executive Director cannot bona fide serve two masters whose interests are in conflict. Obviously, the Executive Director cannot give the judges substantive advice, neither directly nor through the Registries. Practical consequences of that built-in conflict are numerous and are present all along the administrative hierarchy of the Office of Administration of Justice.

35. Section 4 of ST/SGB/2010/3, in respect of the Principal Registrar, provides that:

> 4.1 The Principal Registrar is accountable to the Executive Director.
>
> 4.2 Under the authority of the Executive Director, without prejudice to the authority of the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal in relation to judicial matters, the Principal Registrar is responsible for overseeing the activities of the Registries of the United Nations Dispute Tribunal and the Registry of the United Nations Appeals Tribunal.
>
> 4.3 The core functions of the Principal Registrar are:
>
> (a) Coordinating the substantive, technical and administrative support to the judges of the two Tribunals in the adjudication of cases, including distribution of cases, in particular by monitoring and enforcing compliance with the rules of procedure of the Tribunals by the parties;
>
> (b) Coordinating and monitoring the maintenance of the Tribunals' registers and the publication and dissemination of the decisions, rulings and judgements rendered by the Tribunals;
>
> (c) Coordinating and monitoring the maintenance of the Tribunals' case law and jurisprudence databanks and reporting on the work of the Tribunals, through the Secretary-General, to the General Assembly and other bodies, as may be mandated;
>
> (d) In consultation with the Executive Director, ensuring optimal use of the human and financial resources allocated to the Tribunals; analysing the implications of emerging issues in the Tribunals; and making recommendations on possible strategies and measures;
>
> (e) Advising the Executive Director on administrative, human resources and logistical matters related to the Registries' operational activities and coordinating the preparation of reports on the administration of justice and their presentation to intergovernmental bodies, such as the General Assembly and its committees and the Advisory Committee on Administrative and Budgetary Questions, as appropriate;
>
> (f) Representing, as required, the Executive Director at meetings of intergovernmental bodies, at meetings with United Nations and non-United Nations officials and at international, regional or national meetings.

[3] See Article 97 of the Charter of the United Nations, whereby the Secretary-General is "the chief administrative officer of the Organization"; Article 101 of the Charter, providing that "staff shall be appointed by the Secretary-General under regulations established by the General Assembly"; and section 2 of the statute of the Dispute Tribunal, which provides for the Secretary-General to be the respondent in all matters coming before the Tribunal.

36. Section 4.3, specifically, purports to give judicial power to the Principal Registrar. That provision is demonstrative of a structural and systemic error. The Principal Registrar has no ability, entitlement or power to "enforce compliance with the rules of procedure of the Tribunals by the parties". That is clearly an exclusive function of the judges of both the Dispute Tribunal and the Appeals Tribunal. There are no rules of procedure that provide for such a function to be exercised.

37. There is an issue with the fact that the Principal Registrar holds the position of Principal Registrar in both the first instance Tribunal, the Dispute Tribunal, and the appellate tribunal, the Appeals Tribunal. A clear conflict would arise should there be a need for the Principal Registrar to access confidential information of either Tribunal. There must be distance in respect of such to ensure that reporting officers cannot be the subject of any allegation that they may have influenced an outcome of a case at first instance or on appeal.

38. Conflict is also present with regard to "coordinating the substantive ... support ... in the adjudication of cases", since serving both Tribunals is incompatible with giving the judges substantive advice. The conflict here is amplified by the fact that the Principal Registrar effectively acts as the deputy of the Executive Director in the performance of the duties under sections 3.4 and 3.5 above. Furthermore, the holder of the post of Principal Registrar is ultimately responsible to the Secretary-General, the respondent.

39. The Executive Director of the Office of Administration of Justice faces further conflict by serving as the reporting officer for the head of the Office of Staff Legal Assistance, which provides legal assistance to staff appearing before the Tribunals. Upon the retirement of the Executive Director of the Office in February 2017, it was noted that she had to remain in her post, as it was not possible for the Principal Registrar to act as officer-in-charge of the Office of Administration of Justice. Given the role of the Principal Registrar in the administration of the Dispute Tribunal and the Appeals Tribunal, the holder of that post could not also act as the officer-in-charge of the Office of Staff Legal Assistance, as it is a party appearing before the Dispute Tribunal and the Appeals Tribunal. There is an inherent conflict if the Office of Administration of Justice is involved in the direct administration of the Dispute Tribunal and the Appeals Tribunal and is still a party habitually appearing before those Tribunals (see ST/SGB/2010/3, sect. 7).

40. The staff of the Registries of the Dispute Tribunal are hired by the Office of Administration of Justice. They are required to subscribe to the United Nations staff members' oath of office, but are not obliged to take any oath to keep confidential the communications shared with an assigned judge, to be independent or to work for the ends of justice at the Tribunal. The judges have no role in the selection or any meaningful role in the performance assessment of the staff of the Tribunal. The reporting lines for staff in the Registries, with the exception of the Registrars, go through the Principal Registrar, as second reporting officer, whose reporting line is through the Executive Director, who in turn reports to the Secretary-General. In order to ensure that the staff of the Registries render proper "substantive support", the Tribunal judges stress that the status of the Tribunal staff must be made that of "officers of the court" who are answerable to the judges in some manner.

41. The judges of the Dispute Tribunal are very concerned about the failure of the Office of Administration of Justice to give proper consideration to the need to avoid the risk of actual or perceived conflict when staff from the Management Evaluation Unit or the Office of Legal Affairs, or staff who have acted as counsel for the respondent, are seconded to the Office to undertake work in the Registries of the Tribunals. The Tribunals are considered to be the same as any other workplace in the United Nations, which they are not.

42. The staff lawyers in the Administration generally have little understanding of the doctrine of the separation of powers. That would appear to include the staff of the Tribunals. It has been confirmed by the Registrars of the Dispute Tribunal that, in 2016, the Principal Registrar had the Registrars and their staff work on the reply

of the Secretary-General to the report of the Interim Independent Assessment Panel. It was a formal response to the General Assembly from the respondent, the Secretary-General, as chief administrative officer of the United Nations, and thus as the head of the executive branch. It was therefore inappropriate for the report to have been the subject of consideration by the Tribunal Registrars and their staff. The staff of the judicial branch should not have been working on any document to be provided by the executive branch. As the Principal Registrar is the first reporting officer for the Registrars, and the Executive Director is their second reporting officer, the Registrars were unlikely to be in a position to refuse to work on the document, even if they had considered the issues of separation of powers, which was clearly not the case.

43. The independence of the Office of Administration of Justice is, in fact, a fiction. It may be that independence can only be achieved by having the Office report directly to the General Assembly. The position of the Executive Director of the Office should be considered for a defined term of office that includes a ban on holding further functions within the Organization for a period of five years.

44. The judges of the Dispute Tribunal are concerned that the Office of Administration of Justice as a whole emanates bureaucratic culture, as opposed to judicial culture. The five most-senior positions in the Office are largely dedicated to management. Legal officers and legal assistants are tasked with administrative functions, such as collecting statistics. That situation needs to be addressed, along with the consideration of the substantive work of the Office of Administration of Justice other than advising and representing the Secretary-General.

Uncertain status and conditions of service of judges

45. It is a fundamental international standard that independence of the judiciary is linked to the manner in which its status, in a formal legal sense, is defined and administered. In particular, the Basic Principles on the Independence of the Judiciary, as endorsed by the General Assembly in its resolution 40/146, provide in principle 11 that: "The term of office of judges, their independence, security, adequate remuneration, and conditions of service, pensions and the age of retirement shall be *adequately secured by law*" (emphasis added). Procedure 5 of the Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, endorsed by the Economic and Social Council in its resolution 1989/60, mandates "offering judges appropriate personal security, remuneration and emoluments". In more express terms, the draft Universal Declaration on the Independence of Justice, prepared under the auspices of the Economic and Social Council and recommended by the Commission on Human Rights as a tool for the implementation of the Basic Principles, provides in paragraph 16 (a), under "Tenure" that: "The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their disadvantage."[4]

46. The status and remuneration of the judges of the Dispute Tribunal have been exposed to unilateral interpretations by the Office of Human Resources Management. There is a direct and real conflict of interest posed by the arrangement whereupon the same offices of the Secretariat that appear before the judges of the Tribunal on behalf of the Secretary-General are vested with the power to determine the status and conditions of service of those same judges. Their interpretations as a rule disclose a lack of understanding of the separate status of the judges and seek to treat them as international civil servants and therefore as employees of the Secretariat, that is, the executive.

47. The judges of the Dispute Tribunal are not staff of the Secretariat or the executive, plain and simple. They are elected officials of a subsidiary organ of the

[4] See http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/03/SR-Independence-of-Judges-and-Lawyers-Draft-universal-declaration-independence-justice-Singhvi-Declaration-instruments-1989-eng.pdf.

General Assembly and are within the judicial branch of the governance structures of the United Nations. Paragraph 30 of Assembly resolution 63/253 specifies directly which aspects of the Staff Rules are to be applied to Dispute Tribunal judges. In spite of that, the Staff Rules are improperly applied. For example, staff assessments applicable to staff have been levied upon the salaries of the judges, which has no basis in the resolution, nor could be otherwise justified, as no other judges of the United Nations who are not also staff members pay staff assessments. The newly elected judges of the Tribunal taking office in July 2016 were issued "appointment letters" by the Office of Human Resources Management as if they were staff; moreover, such letters purported unilaterally to decrease the judges' emoluments as if they were staff, and introduced a clause subordinating the judges to all present and future Staff Regulations and Rules. With some variations among the offices of the Secretariat, judges of the Tribunal have been reflected in Umoja as staff members and made to wear "staff" identification badges. Recently, the pensionable remuneration of Tribunal judges was unilaterally decreased by the Administration. Those administrative arrangements are inaccurate and inappropriate external manifestations of a status as international civil servants employed by the Secretariat, which undermines trust in the judges' independence and impartiality.

48. A conflict of interest is inherent in the arrangement in which judges of the Tribunal, when subject to the Staff Rules regime, as augmented, modified and interpreted by the Office of Human Resources Management, are exposed to the risk of disputing those rules and interpretations in their own cases and taking positions which would then compromise their impartiality in all similar disputes coming before them.

49. It is important that, in accordance with the United Nations standards on independence of the judiciary, the status of the judges of the Tribunal, including remuneration, be sufficiently "secured by law", meaning, in the present case, the resolutions of the General Assembly. In respect of remuneration, it is not a matter of the judges requesting an increase in emoluments, but rather that the emoluments paid must be properly determined and secured pursuant to international standards for the judiciary.

Denial of a role in deciding issues relevant to the functioning of Dispute Tribunal

Budget

50. It is apparent from discussions with the Executive Director that the budgets for the Dispute Tribunal, the Appeals Tribunal and the Office of Staff Legal Assistance are to some extent mixed, at least in respect of travel and training. It would appear entirely inappropriate for any budget of the Tribunals to be mixed in any way whatsoever with that of one of the parties appearing before the Tribunals. It is also noted that, contrary to the recognized international standard of judicial autonomy, there has been no consultation by the Office of Administration of Justice with the judges of the Dispute Tribunal concerning the budget for the next two years. That appears to be most unusual, as those framing the budget have no knowledge of the requested needs of the judges, nor, most importantly, of the areas in which the judges consider that funds can be saved.

Training

51. Decisions on spending for training were made without sufficient consultation with the judges. On the basis of information and belief, funds of the Office of Administration of Justice were dispensed for the unnecessary participation of Office bureaucrats in training sessions that were judicial in nature or were otherwise not relevant to their duties at the Office, such as mediation.

Consultation on amendments

52. Judges of the Dispute Tribunal are not being consulted on the drafting of rules and regulations that either define their operations or are otherwise to be applied by them. That is unfortunate, considering the concentration of first-hand knowledge and expertise that the judges represent. A matter in which the opinion of the judges would certainly weigh heavily is in respect of the disciplinary process, an area which at present is replete with problems as a result of inadequate regulation. It is not unusual for judges to be consulted by the legislature, through its committees, in respect of issues of law reform, legislation and regulation.

Other matters

Lack of communication with the General Assembly

53. The judges of the Dispute Tribunal do not report directly to the General Assembly, but rather through the Internal Justice Council. The President of the Tribunal, on behalf of all Dispute Tribunal judges, should report directly to the Assembly through the Sixth Committee and be available for comment to the Assembly, as is the case with the other courts and tribunals associated with the United Nations (see A/71/62/Rev.1, para. 183, and A/71/158, paras. 64-65).

54. The Administration has been reported as having impeded communication between the judges of the Tribunal and the Committees of the General Assembly. In the course of organizing meetings for the plenary session in May 2017, the judges were advised by the secretariat of the Fifth Committee that it had sought to meet with them in the fourth quarter of 2016. The Administration, but not the Office of Administration of Justice, was reported as having opposed that proposal. Moreover, the letter sent by the judges of the Tribunal to the President of the General Assembly was the subject of a diversion from the main issues raised with regard to independence and the issue of emoluments. The issue was portrayed as the judges wanting more money.[5] That was not the case, as the issue of independence does not involve the receipt of larger emoluments by the judges, but rather involves the proper structural setting of such.

Location of the New York courtroom

55. The location of the Dispute Tribunal courtroom in New York is a matter of serious concern. Owing to the fact that the courtroom is located not in the main Secretariat building but in a building that has its own separate security, gaining access to it is extremely difficult for staff members and members of the Permanent Missions of Member States. The Dispute Tribunal in New York was initially in the main Secretariat building. During the massive renovations of the Secretariat building, the Tribunal was relocated to rented premises. The judges were never consulted on the decision not to return to the Secretariat building. The current premises effectively inhibit the attendance of staff members or delegates at hearings, whereas when the Tribunal was located in the main Secretariat building staff as well as delegates showed significant interest in its proceedings. In July 2015, the judges of the Tribunal unanimously decided that the New York seat of the Registry should be in the main Secretariat building and, for reasons of transparency, the Dispute Tribunal courtroom should be there as well. The judges also agreed that it was unacceptable for the Office of Administration of Justice to be located in the Tribunal chambers and that urgent steps should be taken to effect a physical separation of the Office of Administration of Justice from the chambers of the Tribunal, pending the relocation and return of the Tribunal to the main Secretariat building. The sharing of premises has given rise to the impression that the judges

[5] The President of the Dispute Tribunal was advised of such by a senior official of the Administration in Geneva.

are subservient to and accountable to the Administration through the Executive Director.

Dispute resolution mechanism for the judges

56. As a result of the current structure, there are a number of issues in dispute between the executive branch and the judges of the Dispute Tribunal concerning their terms and conditions of service and the application thereof. The judges are placed in an embarrassing position where those matters cannot be resolved since the executive branch, on the advice of the Office of Legal Affairs, may well take a position which the judges find untenable. That is indicative of the need for the institution of a dispute resolution mechanism for the judges, possibly through resort to the International Labour Organization Administrative Tribunal.

Ad litem judges

57. The position of the General Assembly in respect of the regularization of the ad litem judges is well understood. It is indeed hoped that, as the internal justice system matures, the need for ad litem judges may well cease. In the interim, however, it is suggested that the one-year term of renewal leads to uncertainty and is contrary to the notions of independence. It is suggested that such ad litem appointments be made for two years. From past experience, a two-year review cycle, in line with the budget period of the United Nations, would appear to be appropriate.

Referrals for accountability and the issue of the rule of law

58. During the period from 1 January 2016 to 30 June 2017, the Dispute Tribunal referred two cases to the Secretary-General pursuant to article 10.8 of its statute.[6] Those cases resulted from an examination of matters involving a breach of the Staff Regulations and Rules in both fundamental and possibly corrupt ways. One case involved a staff member obtaining a position for which she was not eligible for consideration, having been added to the list of candidates through improper means and after the deadline for applications had expired. The judges do not know what has occurred in respect of the referrals, nor would it be appropriate for them to be involved in the process beyond the referral for accountability. The statute of the Dispute Tribunal provides no details of how a referral is considered, nor any direction in respect of the need to ensure that the enforcement of the laws of the United Nations, as represented by the Staff Regulations and Rules, are not subject to the exercise of a perceived managerial discretion. The notion of the rule of law is such that any identified breach of the law should be the subject of investigation. There is no discretion to waive compliance with the laws of the United Nations and thus authorize an illegal practice. It is suggested that the Internal Justice Council might be an appropriate body to ensure that referrals to the Secretary-General, or those otherwise delegated under article 10.8 of the statute, are properly considered.

Disclosure of information

59. The judges are becoming increasingly concerned that those representing the respondent in cases before the Dispute Tribunal, or those instructing such counsel, do not disclose all relevant documents to applicants and the Tribunal. It has become apparent in some cases that managers have also failed to disclose all relevant documents when a management evaluation of a decision is undertaken. That could result in cases being continued before the Tribunal which would have been resolved earlier if full disclosure had been made. That must represent a cost to all parties and to the Tribunal, as well as constituting an ethical breach of duty to the Tribunal and the Organization.

[6] Art. 10.8 reads: "The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability."

Forms of relief

60. The Dispute Tribunal is very limited in respect of the final relief it may grant. Article 10.5 of the its statute provides that:

> As part of its judgement, the Dispute Tribunal may only order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

61. The judges of the Dispute Tribunal feel it appropriate to draw to the attention of the General Assembly the following observations of a three-judge bench in the case of *Nakhlawi v. Secretary-General of the United Nations* (UNDT/2016/204):

> 103. During the hearing, and upon the Tribunal's further inquiry, the Respondent informed that while at [the United Nations Office at Geneva] there was no case at which the Administration opted for rescission (noting that they in general concerned non-selection/promotion cases, rather than termination decisions), there was no statistical data from [the Administrative Law Section of the Office of Human Resources Management] with respect to cases in the larger Secretariat.
>
> 104. In light of the statements made at the hearing, the Tribunal found that the Respondent's written statement that "the Administration may often elect to pay compensation" appeared to be incorrect. It notes that the reality is that in cases where the Tribunal found that a staff member had been wrongly separated, through no fault of his/her own but rather as a result of managerial error, the decision was systematically taken to pay compensation, instead of considering the reintegration of the staff member.
>
> 105. The Tribunal expressed its concern that the failure of management to give individual consideration to each case in which rescission of a termination decision is ordered, contradicts the spirit and legislative intent of the General Assembly of art. 10.5 of its Statute. By that article, the General Assembly created an expectation for staff members that in cases where the Tribunal orders rescission, for example, of a termination decision, the Administration will give due consideration to the possibility of reintegration before it considers the payment of the amount of compensation set in lieu of rescission, as determined by the Tribunal. The Respondent's submission suggests, however, that no matter what the Tribunal found, Applicants would consistently be given compensation, "for administrative and operational reasons". In other words, no individual consideration is given to the particular situation and no weight is given to the reasons for the rescission. There may, thus, be cases in which the career of staff members, who dedicated their entire professional life to the Organization and its mission, is completely ruined by an act carried out by the Respondent and found to be unlawful. It is apparent to the Tribunal, as demonstrated by the Applicant in this matter, that in light of their specialization in their career at the United Nations, staff members, who are found to have been wrongly terminated as a matter of law, are virtually unemployable outside the Organization. Notwithstanding this, no individual consideration is given to the possibility of reintegration, for "administrative and operational reasons".

106. The Tribunal is of the view that this matter goes to the core of the creation of the "new" internal justice system and the very nature of the accountability of management and the duty of management, and the Organization, towards each and every member of staff, if he or she has done no wrong. It finds that the policy behind the Tribunal's Statute and the whole system of justice is put at risk by the attitude of management to systematically opt for the payment in lieu of rescission under art. 10.5(a). It also expresses its concern that the Statute is silent on how the discretion under art. 10.5 should be exercised and what reasonable consideration under these terms should entail. The foregoing notwithstanding, the Tribunal finds the fact that the Administration was unable to present a single case where individual consideration was given to rescission and subsequent re-integration under art. 10.5(a) of the Statute, shows that it fails to exercise the discretion accorded to it under that article. Failure to exercise discretion is in itself illegal and improper. It is for the General Assembly to consider whether the underlying policy objective is being frustrated by what appears to be an unwritten policy operated by senior managers (see *Valimaki-Erk* 2012-UNAT-276).

107. The Tribunal requests that in this case, actual individual consideration be given to the possibility of rescinding the decision to terminate the Applicant's appointment and to reinstate her in a post commensurate with her qualifications, experience and the grade she had at the time of her separation. This is of particular importance in this case, since the decision maker himself had taken the contested decision on the basis of incorrect information.

108. The foregoing notwithstanding, the Tribunal is mandated, under the Statute, to set an amount of compensation "in lieu of" rescission. It finds that the exceptional circumstances of this case justify the award of compensation exceeding the equivalent of two years' net base salary, set down in art. 10.5(b) of its Statute. The Appeals Tribunal recalled in *Hersh* 2014-UNAT-433 what it had held in *Mmata* (2010-UNAT-092), namely that "art. 10.5(b) of the UNDT Statute does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation".

62. The judges would also observe that both the Administration and the staff of the United Nations may find matters where it would be appropriate to have the Dispute Tribunal or Appeals Tribunal consider specific issues of the interpretation of a law before it is applied.

Drafting of the laws and regulations of the United Nations

63. The judges wish to express their concern in respect of the standard of drafting of the administrative issuances of the United Nations. There are many cases coming before the Dispute Tribunal in which confusion is caused by the use of the auxiliary verbs "will", "shall", "would", "should", "can", "could", "may", "might", "must" and "ought". The almost constant use of the verb "should" leads managers to believe that they have a discretion, when indeed they may not have such a discretion. Clarity in the administrative issuances is important to all, leading to certainty of action. Stating in those laws and regulations that the use of the auxiliary verb "may" indicates the use of discretion, and "shall" or "must" discloses an obligation, would lead to proper clarification.

Need for consent before holding/convening a three-judge panel.

64. The judges of the Dispute Tribunal note that, before a matter is heard before a panel of three judges, the President of the Appeals Tribunal must provide authorization for such. Section 10.9 of the statute of the Dispute Tribunal provides that:

> Cases before the Dispute Tribunal shall normally be considered by a single judge. However, the President of the United Nations Appeals Tribunal may,

within seven calendar days of a written request by the President of the Dispute Tribunal, authorize the referral of a case to a panel of three judges of the Dispute Tribunal, when necessary, by reason of the particular complexity or importance of the case.

65. The judges of the Appeals Tribunal are concerned that such a procedure could unnecessarily complicate procedures and place the President of the Appeals Tribunal in a position where a recusal might be necessary in the event of an appeal concerning any matter that is the subject of such a request, as the President of the Dispute Tribunal would have informed the President of the Appeals Tribunal of the issues of the case and details of the particular complexity or importance of the case. It is suggested that the consideration by the President of the Dispute Tribunal should be sufficient to authorize the convening of such a panel.

Adequate representation of applicants before the Tribunals

66. Unrepresented litigants have a negative impact on the workload of the Tribunal. Unrepresented litigants often do not understand the legal process and tend to file numerous irrelevant documents and submissions, inundate the Registries with unnecessary or inappropriate queries and requests and generally slow down the system, causing delays in proceedings.

67. Almost as important as the lack of legal representation of litigants is the amateurish and often damaging representation by individuals who have no legal training whatsoever. Those individuals also do not understand the legal process and file confused and inarticulate processes that do not disclose any cause of action. There is a dire need to professionalize legal representation.

68. The right to representation, guaranteed by the Universal Declaration of Human Rights and enshrined in the principle of equality of arms, is an essential element of the new system of administration of justice, and the role of the Office of Staff Legal Assistance should continue to be that of assisting staff members not only in processing claims, but in representing applicants before the Tribunals.

Initiatives introduced by the Dispute Tribunal

69. The Dispute Tribunal in Geneva has begun a pilot programme of monthly dialogue meetings with counsel from the Office of Staff Legal Assistance and the respondent, together with the staff from the Registries, to discuss systemic issues and procedures. The tone of the meetings is such as to encourage active participation by all participants with a view to increasing the understanding of all participants of the hybrid nature of the Tribunal, in which judges come from different legal cultures. A copy of the areas of general discussion is available on request.

70. In May 2017, a digest of cases was completed for internal use by the Dispute Tribunal. It is a detailed document referring to the cases of both the Dispute Tribunal and the Appeals Tribunal. It is hoped that the document will be expanded to include relevant cases of the International Labour Organization Administrative Tribunal, in recognition of the observations of the Redesign Panel on the United Nations system of administration of justice in respect of the need to have some harmonization across the United Nations system. The digest is entirely computer-based and will be accessible to all staff.

71. The judges have begun writing a bench book and hope to complete it within the next nine months.

MEETINGS

Internal meetings

72. The judges continue to hold regular meetings through videoconferences, with Judge Meeran participating whenever possible by telephone from the United Kingdom. The half-time judges attend all meetings, either in person or by telephone, when not deployed. The meetings have proven to be invaluable and allow for the judges to deal with issues as they arise and in a timely manner.

Meeting of the judges with the Internal Justice Council

73. The judges of the Dispute Tribunal met with the Internal Justice Council during their plenary session held New York in May 2017. Issues pertinent to the Tribunal and the internal justice system were discussed.

Meeting of the Dispute Tribunal with stakeholders and practitioners

74. Meetings with the Dispute Tribunal's stakeholders continue to be held on a regular basis at each seat of the Tribunal. The invitees include counsel appearing before the Tribunal as well as representatives of staff unions and management. The meetings provide for a useful interchange of ideas in an appropriate environment in which Tribunal users and the judges of the Tribunal can be free to make observations and comments. The feedback gained assists the Tribunal.

75. In Nairobi, the judges participated in a symposium organized by the Ombudsman of the United Nations and spoke on the complementarity of the formal and informal systems in the United Nations internal justice system and on the efforts of the Dispute Tribunal to explore the mediation of cases as a first step. They also offered advice on how mediators can strengthen mediation agreements to protect staff members who find themselves retaliated against after entering into such agreements.

76. During the plenary session and subsequent workshop in May 2017, the judges of the Dispute Tribunal held meetings with the Chair and Deputy Chair of the Advisory Committee on Administrative and Budgetary Questions, the Chair of the Fifth Committee, the Secretary-General and a number of senior administrative officials of the Organization.

Readiness of the Dispute Tribunal judges

77. The judges of the Dispute Tribunal, as with any judiciary, are available to discuss issues with the General Assembly and the Administration of the United Nations with a view to resolving any of the issues mentioned in the present report. During the plenary session in May 2017, meetings with senior-level Secretariat officials indicated a willingness on their part to consider at least some of the issues raised in the present report. The judges believe that issues will be better understood and hopefully addressed in the near future.

Note of acknowledgment

78. The judges of the Dispute Tribunal wish to again record their appreciation of the work of the staff of the Registries of the Tribunal.